87-1773

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENDER COUNTY BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

EDWIN G. PIVER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. May a court award judgment in favor of a public employee who claims to have been discriminated against for exercising his right to speak on a matter of public concern without first determining that the speech was a substantial or motivating factor behind the employer's action and that the action would not have been taken but for the speech?
2. In a public employee free speech case, may an appellate court presume facts that are not in evidence, contrary to the record and not addressed by the district court in order to resolve the *Pickering* "balancing test" as a matter of law?
3. Does significant community interest in the content of a public employee's speech provide that speech with absolute first amendment protection regardless of the form or context of the expression?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners: Pender County Board of Education; Board of Education members Billy O. Rivenbark, Wilbert Henry, Charles F. Sidbury, J. J. Smith and R. E. Brown; and Superintendent of Schools M. D. James; and Respondent: Edwin G. Piver. The "Pender County Schools" was also a named defendant but was dismissed from this action by the district court because it is not a legal entity under North Carolina law. All other original parties remain and are parties to this petition.

Petitioner Pender County Board of Education has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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The Petitioners, Pender County Board of Education, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on December 22, 1987, and upon which the Fourth Circuit denied rehearing on January 26, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 835 F.2d 1076, and is reprinted in the Appendix hereto, beginning at p. 1a, *infra.*

The decision of the United States District Court for the Eastern District of North Carolina has not been

reported. It is reprinted in the Appendix hereto, beginning at page 16a, *infra.*

The decision of the United States Court of Appeals for the Fourth Circuit denying Petitioners' petition for rehearing has not been reported. It is reprinted in the Appendix hereto, beginning at p. 23a, *infra.*

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983 and §1985(3), Respondent brought this suit in the Eastern District of North Carolina. On February 24, 1987, the district court granted Petitioner's motion for summary judgment. *See* Appendix at p. 16a, *infra.*

On December 22, 1987, the United States Court of Appeals for the Fourth Circuit entered an opinion reversing the district court's order and remanding the case for consideration of the issues of compromise and settlement and damages. *See* Appendix at p. 1a, *infra.* On January 5, 1988, Petitioner filed in the Fourth Circuit Court of Appeals a Petition for Rehearing and Request for Rehearing in Banc, which subsequently was denied on January 26, 1988. *See* Appendix at p. 23a, *infra.*

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

1. United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. United States Constitution, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 United States Code §1983:

Each person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Nature and Course of the Proceedings

On June 25, 1985, Respondent filed this action pursuant to 42 U.S.C. §§1983 and 1985(3), claiming that the Pender County Board of Education, various individual Board members and the Superintendent of Schools had violated and had conspired to violate his first amendment free speech rights by transferring him to another high school and then requiring him to sign a statement of support in return for a rescission of the transfer. Piver's equal protection and conspiracy claims were dismissed by the district court on January 10, 1986. Those claims are not at issue here.

On February 4, 1987, the district court dismissed on summary judgment Piver's remaining §1983 claims in which he alleged that the Petitioner had violated his first and fourteenth amendment rights. The district court found that the speech at issue did not involve matters of public concern and, therefore, Piver could claim no constitutional protection from actions he complained were based on his speech. Respondent appealed the district court's summary judgment order. No evidentiary hearing or other fact finding proceeding has yet taken place at the district court level.

In an opinion issued on December 22, 1987, the Fourth Circuit Court of Appeals reversed and remanded, finding that the speech at issue addressed matters of public concern. *See* Appendix at p. 1a, *infra*. The court went on to hold that Piver's interest in making the speech outweighed the Board of Education's interest in the efficient operation of its schools. The appellate court remanded only on the

issues of whether Piver had compromised and settled his claim and, if not, for a determination of damages on the first amendment issue.

On January 5, 1988, Petitioner filed in the Fourth Circuit Court of Appeals a Petition for Rehearing and Request for Rehearing in Banc. This petition was denied on January 26, 1988. *See* Appendix at p. 23a, *infra*. Petitioner now files this application for writ of certiorari, pursuant to 28 U.S.C. §1254(1), within ninety (90) days of the denial by the court of appeals of the Petition for Rehearing.

Statement of the Facts

Edwin Glenn Piver, Respondent, is a tenured social studies teacher who has been employed by Petitioner, Pender County Board of Education (the "Board"), at all times relevant to this action. In April of 1982, the Board voted not to renew the contract of Ralph Jourdan, then the principal at Topsail High School where plaintiff was teaching.

The evidence in the Record on Appeal includes deposition testimony and affidavits and shows the following: Piver was deeply supportive of Jourdan and actively campaigned for the renewal of his contract. Prior to the nonrenewal of Jourdan's contract, M. D. James, then superintendent of the Pender County Schools, as well as individual Board members, began receiving complaints from parents that Piver was soliciting support for Jourdan from his students during class, including encouraging students to sign a petition in support of Jourdan or have a gathering to dem-

onstrate support for Jourdan. (James dep. at 29-36)[1] According to James, the parents expressed concern that Piver was "button-holing" students, attempting to influence them to sign a petition with which they did not agree. (James dep. at 33) Superintendent James felt that this activity by Mr. Piver was improper, as both a misuse of class time and an abuse of his position and authority to try to unduly influence students. (James dep. at 31).

Superintendent James met with Mr. Piver and Mr. Jourdan and discussed the complaints from parents about Mr. Piver's activities. Jourdan and Piver admitted at that point that Piver had been out of his classroom with Jourdan's approval but denied that Piver had been soliciting support for Jourdan during this time. (James dep. at 49).

Also around this time Piver spoke to the Board on Jourdan's behalf at a private, closed session of an April 1982 school board meeting. The Board invited members of the public and school staff to this meeting to express their opinions on Jourdan's performance. (R. 937)[2] The only persons present when Piver spoke were the five Board members, the Superintendent and the Board attorney.

After this Board meeting, another staff member at Topsail High School, Wanda Cherry, complained to

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[1] Citations to the deposition of Superintendent M. D. James are designated as (James dep. at ___). The James deposition was made a supplement to the record on appeal by order of the court of appeals and therefore is referred to separately from designations to the original record.

[2] References to the record on appeal are designated as (R.).

Superintendent James that Piver was harassing her because she had spoken out against Jourdan at the April Board meeting. (James dep. at 34).

After Jourdan's contract was nonrenewed by the Board in April of 1982, Piver continued to work to try to get the Board to reverse its decision. Around this time the Superintendent talked with several faculty members who expressed concern that the situation at the school was very tense and the faculty was divided over the issue of Jourdan's nonrenewal. (James dep. at 44).

James went to the school and met with the faculty members to encourage them to leave the matter behind them and not to allow the issue to disrupt the smooth operation of the school. (James dep. at 44) Even after this meeting with the faculty, the Superintendent continued to receive complaints from parents about Mr. Piver's activities. (James dep. at 47) Throughout this controversy over Mr. Jourdan's employment, Mr. Piver was the only one about whom Superintendent James recalled receiving any complaints. (James dep. at 46).

On July 26, 1982, the Board met and discussed the disruptive situation facing the new principal at Topsail High School. Dr. James and Board members were concerned that Piver would continue his disruptive activities within the school setting, and thereby divide the faculty and students and undermine the new principal. (James dep. at 53-54) As a result of these concerns and the desire of the Board to afford the new principal every opportunity to succeed in an orderly environment, the Board voted to transfer Mr. Piver to another school. (James dep. at 56).

Piver filed a grievance requesting that the transfer be rescinded. In August of 1982, after negotiations between attorneys for Piver and the Board, Piver and the Board reached an agreement that the transfer would be rescinded in exchange for Piver signing a statement wherein he agreed to cooperate fully with the new principal, to perform his duties and to support the Board in the implementation of its policies and decisions.[3] In signing this statement Piver simply was agreeing to perform his statutory obligations as a teacher. Piver signed this statement of support and never worked at the other school.

About a year later, after Piver retained different counsel and upon Piver's request, the Board agreed to remove the statement from Piver's personnel file.

REASONS FOR GRANTING THE WRIT

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court set forth the standard to be used in determining whether a public employee's speech is protected under the first amendment. Since that time the lower courts have struggled to apply *Connick's* mandates effectively and to reconcile with *Connick* this Court's prior decisions regarding the parameters of public employee free speech. One of the most significant issues confronting the lower courts is how to manage such cases procedurally.

The circuit courts have applied the *Connick* decision inconsistently, resulting in much confusion over the proper procedural approach to these first amendment

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[3] The text of the statement signed by Piver appears in the district court's opinion at footnote 1. *See* Appendix at p. 18a, *infra*.

cases. This case presents the Court with an excellent opportunity to define for the lower courts a four-step procedure for the proper analysis of cases of this nature as set forth by this Court in *Connick*, 461 U.S. at 138; *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). The manner in which the Fourth Circuit Court of Appeals decided the issues in this case and the conflicts among the circuit courts of appeal as to the procedure and analysis for dealing with public employee free speech issues demonstrate the strong need for guidance from this Court.

I. THE COURT OF APPEALS DECISION VIOLATES CLEARLY ESTABLISHED PRECEDENT BY FAILING TO REQUIRE RESPONDENT TO PROVE THAT THE SPEECH IN QUESTION WAS A SUBSTANTIAL OR MOTIVATING FACTOR RESULTING IN THE COMPLAINED OF TRANSFER DECISION AND BY PRECLUDING PETITIONERS FROM OFFERING IN THEIR DEFENSE THE REASONS RESPONDENT WOULD HAVE BEEN TRANSFERRED IRRESPECTIVE OF HIS PROTECTED ACTIVITIES.

The Fourth Circuit began its analysis of this case with the faulty premise that "a court reviewing [a public employee's first amendment] claim must pursue a two-step analysis." *See* Appendix at pp. 4a-5a, *infra*. First, the court noted the public concern analysis required by *Connick*, 461 U.S. at 138. Then the court attempted to conduct a balancing test to determine whether the interests of the speaker in making the speech outweighed the interests of the employer in maintaining an efficient workplace. *See Pickering*, 391

U.S. at 563. The court then remanded this issue for determination of damages, totally ignoring the crucial third and fourth steps required by this Court's holdings in *Mt. Healthy*, 429 U.S. at 274 and *Givhan*, 439 U.S. at 410. Even though Piver may have demonstrated to the satisfaction of the court of appeals that his speech was constitutionally protected, *Mt. Healthy* requires a plaintiff to establish a nexus between the protected activity and the action taken by the Board before defendants may be found liable for an improper action. 429 U.S. at 284. Further, even if a jury agrees with Piver and he is able to prove this disputed issue of fact, the Board is entitled to present evidence in its defense to demonstrate that the complained of transfer decision would have been made without regard to Piver's protected activities. *Givhan*, 439 U.S. at 416 and *Mt. Healthy*, 429 U.S. at 284. These are issues of fact to be decided at the trial court level if the speech at issue is first found to be constitutionally protected.

Rather than remand this case for further proceedings on these outstanding factual issues, the court of appeals totally ignored the requirement that Piver bear any burden to prove that his protected activities were the substantial or motivating factors leading to the Board's decision to transfer him. In the absence of such a showing, Piver has not even established a *prima facie* case. *See Mt. Healthy*, 429 U.S. at 274. *See also Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986). The Fourth Circuit also appears to have precluded the Board from any opportunity to defend its decision on other grounds. Rather, the court of appeals launched into a discussion of the proper measurement of damages to be applied by the district court

on remand (unless the district court determines that the case previously was compromised and settled).

The Board's reasons for its decision to transfer Piver clearly are unresolved issues of fact to be decided at the trial court level.[4] *Mount Healthy*, 429 U.S. at 284. In deposition testimony Piver has stated his belief that the transfer decision was *solely* in retaliation for the election defeat of Board Chairman J. J. Smith and that Smith was the moving force behind what Piver considered to be a conspiracy to transfer him.[5] Piver also has asserted that the transfer may have been in retaliation for his speech to the Board of Education on the Jourdan tenure decision, despite his admissions that the speech was made in closed, private session, that he does not know that he said anything in his speech to cause the Board to retaliate and that he has no evidence to support this allegation. (R. 937-941) Nowhere in the record does Piver attempt to claim any first amendment protections for his classroom activities or his discussions with other teachers during school and class time.

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[4] The Fourth Circuit is aberrant among the circuit courts on this issue, having construed the "substantial, motivating factor" and "but for" tests of *Mt. Healthy* and *Givhan* as questions of law for the court to decide. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 878 (4th Cir. 1984).

[5] The record details the fact that J. J. Smith, then Board Chairman, is the uncle of Piver's wife. The record further describes intra-family squabbling, discord and hard feelings among Smith, Piver, Piver's wife, Piver's mother-in-law and Piver's mother, following Smith's election dispute. The disputed election resulted in the defeat of Smith, who charged Piver's wife and mother-in-law with election law violations. That charge was heard and initially decided by the county board of elections, a three-member panel which included Piver's mother.

In contrast, the defendants in their depositions testified that they were concerned primarily that Piver, through his continued disruptive activities in the classroom and in the school setting, would attempt to undermine Jourdan's replacement and poison the school atmosphere under a new principal at a time when the Board was seeking to restore a calm school environment conducive to the educational process. (*See, e.g.*, R. at 628-629, 636-639, 906-907; James dep. at 44-46, 53-54).

These factual issues are for a jury to sort out following the presentation of evidence. Because these are issues of fact and because they are so obviously disputed, they never have been presented for argument or consideration during the prior proceedings. They were not argued by Petitioners in their motion for summary judgment on the threshold "public concern" and "balancing" issues. They never were addressed by the district court because they have not yet been properly before that court. Nor were they (or should they have been) addressed by the court of appeals.

Not only did the court of appeals overlook the fact that these critical issues had not yet been addressed by the district court, it appears to preclude their consideration altogether without regard for either the exclusive fact-finding province of the district court or this Court's requirement that such a case proceed to the third and fourth steps necessary for a proper first amendment analysis under the *Mt. Healthy* and *Givhan* rulings.

Given the court's decision that Piver's speech is protected, this case should have been remanded to the district court for further proceedings not only on

the compromise and settlement issue, but to determine the factual issues of (1) whether Piver's speech was a substantial or motivating factor in the decision to transfer him, *Mt. Healthy*, 429 U.S. at 284; and (2) if so, whether the Board would have taken the same action based on other grounds. *Givhan*, 439 U.S. at 416. Both of these factual issues must be addressed prior to any consideration of damages.

The two-step analysis enunciated and applied by the Fourth Circuit in this case is in obvious and rather extreme conflict with the rulings of this Court and the most recent rulings of every other federal circuit court that has addressed this issue. *See Givhan*, 439 U.S. 416; *Mt. Healthy*, 429 U.S. at 284; *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 830 F.2d 294, 309-310 (D.C. Cir. 1987); *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096, 1099 (5th Cir. 1987); *Ohse v. Hughes*, 816 F.2d 1144, 1154 (7th Cir. 1987), *cert. denied*, *Hughes v. Ohse*, 108 S.Ct. 748 (1988), *vacated*, *Ohse v. Hughes*, 108 S.Ct. 1070 (1988); *Homer v. Brown*, 831 F.2d 1398, 1403 (8th Cir. 1987); *Allen v. Scribner*, 812 F.2d 426, 433-435 (9th Cir. 1987); *Nicholson v. Gant*, 816 F.2d 591, 599 (11th Cir. 1987); *Rodriguez Rodriguez v. Munoz Munoz*, 808 F.2d 138, 143-144 (1st Cir. 1986); *Marohnic v. Walker*, 800 F.2d 613, 615-616 (6th Cir. 1986); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, *Spurlock v. Wren*, 107 S.Ct. 1287 (1987); *Johnson v. Lincoln University of Commonwealth System of Higher Education*, 776 F.2d 443, 450-455 (3rd Cir. 1985); *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46-47 (2nd Cir. 1983).

II. THE COURT OF APPEALS' APPLICATION OF THE PICKERING BALANCING TEST SUBSTANTIALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT THE DECISION (1) IS BASED ON FACTS NOT IN EVIDENCE AND UPON UNRESOLVED QUESTIONS OF MATERIAL FACT WHICH HAVE BEEN DECIDED IN THE FIRST INSTANCE BY THE COURT OF APPEALS IN RESPONDENT'S FAVOR, WITHOUT BENEFIT OF FACTUAL FINDINGS BY THE DISTRICT COURT, AND (2) IS INCONSISTENT WITH THIS COURT'S RECENT DECISION IN RANKIN V. McPHERSON AND OTHER DECISIONS OF THIS COURT AND SEVERAL OF THE CIRCUIT COURTS.

After reversing the district court on the public concern issue, the court of appeals went on to balance Respondent's interest in his protected speech against the interest of Petitioners in the efficient operation of the schools, an issue not reached by the district court. The "balancing inquiry" is fatally flawed as the result of (1) presumptions of facts not in the record, (2) the resolution of disputed and, as yet, unresolved facts in favor of Respondent, without the benefit of evidence being presented and facts being found at the district court level, and (3) the overlooking of many important factors to be analyzed. This analysis by the court of appeals is contrary to all principles of judicial review.

It is axiomatic that the role of the trier of facts at the trial court level is to make findings of fact based upon evidence presented. *See* Fed. R. Civ. P. 52(a). If there are outstanding disputed issues of fact they must be construed in the light most favorable to the nonmoving party for purposes of resolving a

summary judgment motion, such as the one at issue here. *United States v. Diebold*, 369 U.S. 654 (1962). Clearly this does not mean that the construing of such facts for purposes of a summary judgment motion justifies entry of summary judgment in favor of the nonmoving party. However, that is precisely what the court of appeals did in this instance. Additionally, the court of appeals presumed and inferred facts that were not even in the record, far exceeding the proper scope of appellate review.

In *Rankin v. McPherson*, 97 L.Ed.2d 315, 325 (1987), this Court instructed that, in an analysis of the protected nature of public employee speech, the role of the reviewing court is to assure that the record supports the lower court's conclusion that the employee's statements and the circumstances under which they were made are of a character which the principles of the first amendment protect. The Fourth Circuit has gone far beyond this charge by incorrectly assuming facts not in the record, construing disputed facts in favor of Respondent and granting judgment for Respondent on this issue, rather than remanding to the district court for factual findings.

In performing the *Pickering* balancing test, the court of appeals attempted to weigh some vaguely presumed interest of Piver "as a teacher in engaging his social studies students in issues of interest to the community" against the charge that Piver's actions were disruptive. The Fourth Circuit balanced Piver's interest in that classroom activity against the reasonable apprehensions of the defendants that Piver was disrupting school activities as follows:

> Although a teacher must obviously be wary of attempting to communicate his personal

> prejudices on issues that have more than one side, there is no indication in the record that Piver tried to propagandize his views. Instead, the record indicates that Piver merely allowed the students to discuss the issue and to use class time to organize their own petition drive in support of Jourdan. . . . In contrast to the weighty interests supporting Piver's speech, the school board asserted only a threat of "turmoil" at the school. . . .

See Appendix at p. 11a, *infra*. Ignoring credible evidence of complaints and based on nothing more than the fact that Piver taught social studies, the court leaped to assume that his comments amounted to "the guiding of class discussion and participation" within his classroom. *See* Appendix at p. 8a, *infra*.

Apparently because of the mere happenstance that Piver taught social studies, rather than algebra or physics, the court assumed that Piver's commandeering of class time to discuss his personal concerns regarding the nonrenewal of his principal falls within the protections of the first amendment.

Nowhere in the record has Piver asserted that he attempted to guide class discussion on the issue of the principal's nonrenewal as an exercise in civics instruction that might somehow be tied to his course curriculum. The court of appeals simply inferred this fictitious, benign scenario without the slightest support in the record. There is no evidence, least of all in Piver's own testimony, that his misuse of class time to discuss the issue of the principal's nonrenewal was sanctioned because of the fortuitous coincidence that Piver taught social studies. In fact, there is no indication in the record that any discussion that oc-

curred was in any way linked to Piver's teaching or to his lesson plans or to the required course curriculum. The only justification offered by Piver for his misuse of class time was a general assertion that he believed the principal's nonrenewal was a general topic of discussion that he felt sure would be discussed in other classes as well as his own. (R. 969-974) This justification offered by Piver is in sharp contrast to that presumed by the court of appeals, that Piver's activities within the classroom had some vague connection to "training in civics" that might occur in a social studies class.

Even assuming Piver's classroom activities in support of Jourdan involved speech on a matter of public concern, the court of appeals' analysis overlooks many important factors. This Court recently determined that "the very nature of the [*Pickering*] balancing test [makes it] apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Rankin*, 97 L.Ed.2d at 327. The factors considered determinative in *Rankin* were that (1) there had been no disruption of the workplace following McPherson's protected speech; (2) the speech took place in private rather than in public; and (3) McPherson was not in a policymaking, confidential or public contact position which would increase the danger of disruption.

In contrast to that of McPherson, Piver's speech was more widespread and public, resulting in substantial disruption of school activities to the point that parents and faculty members complained he was not performing his duties and was creating dissention at the school. (R. 355, 626; James dep. at 29-30, 32-33, 41, 88-89) Additionally, Piver was in a public contact

position where he had control over students during his entire workday.

The Fourth Circuit's analysis in this case totally dispatches the reasonable apprehensions of the defendants with the half sentence: "the school board asserted only a threat of 'turmoil' at the school." Contrary to the court of appeals' conclusion, the record is replete with the deposition testimony of defendant Board members and Superintendent James showing that they were responding to reports of Piver's actual and substantial disruption of classroom and school operations. (*See, e.g.*, R. 472, 519, 628-629; James dep. at 29-36) These included complaints that Piver was lecturing students about the Jourdan matter during class time, circulating a petition in support of Jourdan in his classroom and pressuring students to sign it, leaving his classroom unattended while he was soliciting support for Jourdan among faculty members, and shepherding students from the bus into an area where they were coerced into signing a petition.[6] (*See, e.g.*, James dep. at 29-36).

By all accounts, including that of Piver, there was a substantial amount of actual turmoil, disruption and divisiveness at the school, much of it occasioned by Piver. (*See, e.g.*, R. 474, 519, 628-629; James dep. at 29-36) Many of these activities occurred well after Piver's presentation at the Board meeting and after

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[6] Even Jourdan admitted that Piver had been out of his class during instructional time to survey other teachers regarding the Jourdan matter, rather than attending to his duties. According to the assistant principal, Mr. Kermon, Jourdan advised him that Piver was circulating a petition against even Jourdan's wishes. Jourdan instructed Kermon to advise Jourdan if he observed Piver doing so.

the Board had made its final decision not to rehire Jourdan.

Piver's activities at school gave rise to legitimate employer concerns recognized by this Court in *Rankin v. McPherson*, 97 L.Ed.2d at 315; *Connick v. Myers*, 461 U.S. at 138; and *Pickering v. Board of Education*, 391 U.S. at 563. At the very least, the record raises genuine issues of material fact about the extent to which Piver's speech in the school setting contributed to disharmony in the workplace, impeded the proper performance of his duties and those of his fellow teachers, and improperly subjected his students to undue pressure and influence in a captive setting.

Piver's speech activities within his classroom differ drastically from his speech before the Board so heavily relied upon by the court of appeals in its only "context" analysis.[7] Piver's speech within his classroom is substantially different from speech in a governmental hearing to which people are invited to express their views. It was speech within a classroom to a captive audience of students taking a required course and compelled by law to attend school. The complaints voiced to defendants make clear that many in that audience felt they were being subjected unfairly to Piver's views at a time when they should have been addressing the required course curriculum. (James dep. at 29-36) Indeed, the district court made such a finding, noting that "[t]he record further reveals that the Board had received complaints about

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[7] The only speech discussed by the Fourth Circuit in its context analysis was that speech which the court states "took place primarily in a public meeting for the purpose of discussing Jourdan's tenure." *See* Appendix at p. 8a, *infra*.

Piver's attempts to enlist support for Jourdan during class time." *See* Appendix at p. 20a, *infra*.

Neither students nor teachers surrender their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Pickering*, 391 U.S. at 563. But, while a teacher does not lose his freedom to express himself as a condition of his employment, that freedom is not unlimited. *See, e.g., Pickering*, 391 U.S. at 563. In a long line of cases covering a wide range of serious concerns, this Court has recognized and, in balancing various protected interests, has given great weight to "the special characteristics of the school environment." *Hazelwood School District v. Kuhlmeier*, 108 S.Ct. 562 (1988); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Brown v. Board of Education*, 347 U.S. 483 (1954). Within this special school environment, speech actually occurring in the classroom has come under particularly close scrutiny.

Courts regularly have held that while teachers are free to express their personal political views, they are not entitled to use the classroom as a forum for promoting those views or directing expressions of insubordination at school officials. *Ahern v. Board of Education of Grand Island*, 327 F.Supp. 1391 (D. Neb. 1971), *aff'd.*, 456 F.2d 399 (8th Cir. 1972) (teacher was properly disciplined for teaching "politics" in her economics class, rather than the required course curriculum; teacher had no constitutional right to use her classroom as a forum for expressing her views

regarding these affairs); *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (public school teacher could not disregard the prescribed curriculum for first amendment reasons); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) (interest of the state in providing an orderly, efficient education was enough to override the teacher's first amendment right to determine the content of a required course).

The Fourth Circuit made virtually no analysis of the speech occurring within Piver's classroom. The court simply assumed the basis for the Board's action was Piver's speech before the Board, totally glossing over Piver's activities at work and thus not paying any particular attention to the unique nature of the school environment or Piver's captive student audience.

III. IN HOLDING THAT COMMUNITY INTEREST IN THE CONTENT OF A PUBLIC EMPLOYEE'S SPEECH PROVIDES THAT SPEECH WITH ABSOLUTE FIRST AMENDMENT PROTECTION, REGARDLESS OF ITS FORM OR CONTEXT, THE FOURTH CIRCUIT ERRONEOUSLY INTERPRETS THIS COURT'S DECISIONS AND IS IN CONFLICT WITH OTHER FEDERAL CIRCUIT COURTS.

In his complaint, Respondent alleged that his first amendment rights were violated because (1) he spoke out in support of his principal, Ralph Jourdan, at a school board meeting and (2) he supported the opponents of two Board members in elections held shortly after the controversy about the nonrenewal of Jourdan's contract.[8]

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[8] Both the district court and court of appeals found no evi-

On the issue of Respondent's speech regarding the renewal of Jourdan's contract, the district court found that the speech did not involve matters of public concern, holding that disputes about personnel matters, such as the decision not to grant tenure to a principal, were matters of private rather than public concern. The court of appeals reversed, holding that Piver's speech in support of Jourdan was about a matter of public concern because it was a matter in which the community was vitally interested and "appeared" not to be motivated by self-interest. *See* Appendix at p. 8a, *infra*.

In *Connick*, 461 U.S. at 138, this Court ruled that the first amendment would not protect a public employee from adverse personnel action resulting from his speech unless that speech was about a matter of "public concern." The Court also held that the issue of whether the speech was on a matter of public concern was a threshold issue to be decided as a matter of law by a court before trial, thereby avoiding a plenary hearing on a matter that was not actionable. *Id.*

In this case and others, the Fourth Circuit Court of Appeals has interpreted erroneously this Court's language in *Connick* to mean that the level of community *interest* determines whether the issue is a matter of public concern. *See* Appendix at p. 8a, *infra*; and *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985). Here the court of appeals specifically held

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dence to support Piver's contention that he was involved in the election campaigns or that any support he may have shown was a factor in the decision to transfer him. The courts rejected any notion that Respondent's remote involvement in school board election activity was sufficient to support a first amendment claim.

that Piver's speech addressed a matter of public concern because he "spoke out on a matter in which the community was interested," and therefore the "subject of his speech was of much wider importance than a mere 'private personnel grievance.' " *See* Appendix at p. 8a, *infra*. As noted by Justice Scalia in his dissent[9] in *Rankin*, such a result is "obviously untenable" as it would encourage employees to turn displeasure into a cause celebre to avoid adverse personnel action. 97 L.Ed.2d at 333 (Justice Scalia dissenting). This is precisely the result *Connick* sought to avoid. 461 U.S. at 138.

Connick makes clear the necessity to examine the content, form and context of each statement in issue, as revealed by the whole record, to determine whether the speech dealt with matters of public concern. 461 U.S. at 138. Implicit in this Court's analysis of each question in the questionnaire in *Connick* is the need to examine each instance of speech alleged to form the basis for an adverse personnel decision, rather than make a sweeping generalization that all speech on a given subject is speech on a matter of public concern.[10] *Connick*, 461 U.S. at 138; *Johnson v. Lincoln University of the Commonwealth System of Higher Education*, 776 F.2d 443, 450-455 (3rd Cir. 1985).

Despite the direction in *Connick* that the content, form and context of each statement at issue should be analyzed separately, the Fourth Circuit failed to

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[9] The Chief Justice, Justice White and Justice O'Connor joined in Justice Scalia's dissent.

[10] The district court in *Connick* was criticized for ruling that the questionnaire "as a whole" involved matters of public concern. *Connick*, 461 U.S. at 143.

do so in this case. In fact, the Fourth Circuit made the sweeping generalization that all of Piver's speech throughout the six months or so prior to and after the Board's final action on Jourdan's contract was protected by the first amendment. This analysis goes far beyond Piver's claim that his protected speech before the Board and his election activities were the causes of his transfer. Without ever addressing the contexts and forms of Piver's other activities, the court of appeals summarily concludes that the disruptive activities in which Piver participated during the school day, during instructional time, also are protected.

This analysis relies almost exclusively on the content of the speech as the determining factor. The Fourth Circuit's only reference to the "context" of Piver's speech was the statement that it "took place primarily in a public meeting called primarily for the purpose of discussing Jourdan's tenure."[11] *See* Appendix at p. 8a, *infra*.

Piver's appearances before the School Board were not the problematic activities. To the contrary, this speech was encouraged by the Board. Rather, it was the form and context of Piver's speech outside of this forum which was a problem—the fact that he left his class unattended to discuss Jourdan's status with his

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[11] In numerous places in its discussion the court of appeals incorrectly refers to this meeting as "public," describing Piver's role as that of informing the community. The court totally ignores the undisputed fact that Piver did not speak at a public school board meeting but rather presented his personal opinion behind closed doors in an "executive" or nonpublic session, addressing only the members of the Board of Education, the Superintendent and the Board attorney.

fellow teachers and that he spent class time discussing the subject, allegedly pressuring his students to participate in his efforts to keep Jourdan as principal. (R. 275-276, 326, 355, 368-369, 457-458, 461, 510-511, 632-633) Surely the Board is not without authority to distinguish between Piver's perfectly appropriate speech at a school board meeting and his disruptive activities in the school and the classroom. At the very least, the court of appeals should have recognized the need to examine closely Piver's schoolhouse activities. To group all of these activities together completely ignores the "context" element of the *Connick* analysis and the requirement that each statement be analyzed separately.

The court's failure to analyze separately and delineate precisely which of Piver's various statements were protected makes it impossible to address properly the subsequent issues to be determined by the court or a jury: (1) whether Piver's right to speak freely outweighs the school system's interest in its efficient operation; (2) whether the protected speech was a substantial or motivating factor in the transfer decision; and (3) whether the transfer would have been made in spite of the protected speech. *See Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2536

EDWIN G. PIVER,
Plaintiff-Appellant,

versus

PENDER COUNTY BOARD OF EDUCATION; BILLY O. RIVENBARK; WILBERT HENRY; CHARLES F. SIDBURY; J. J. SMITH; R. E. BROWN, individually and as a member of the Pender County Board of Education; M. D. JAMES, individually and as Superintendent of Schools of Pender County,
Defendants-Appellees,

PENDER COUNTY SCHOOLS,
Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Terrence W. Boyle, United States District Judge. (CA-85-71).

Argued: July 2, 1987 Decided: December 22, 1987

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

William Robert Shell for Appellant; Richard Allen Schwartz (Tharrington, Smith & Hargrove on brief) for Appellees.

ERVIN, Circuit Judge:

This action for damages under 42 U.S.C. § 1983 (1982) was brought by a high school teacher who spoke out in support of tenure for his principal. The principal was later discharged, and the teacher was reassigned to a junior high school some forty miles from his home. The transfer never took place, however, because the teacher signed a statement of support for his new principal and the school board gave him back his original job. The teacher nevertheless sued, arguing that the state had taken adverse action against him because of the exercise of his first amendment right of free speech. The district court granted summary judgment for the defendants on the theory that the content of the teacher's speech was not a matter of public concern, and hence was not constitutionally protected. We reverse on that issue: the speech concerned matters of central importance to the public. We remand for consideration whether the teacher compromised and settled his claim against the defendants by signing the statement and returning to his original job.

I.

Plaintiff-appellant Piver is a career social studies teacher employed by the defendant Pender County Board of Education (hereafter "the school board"). Piver worked at all times relevant to this action at the Topsail High School. In April, 1982, by a vote of four to one, the school board elected not to renew the contract of R. J. Jourdan, the principal at Topsail High School. The issue of Jourdan's contract had been the topic of extensive discussion at the high school prior to the school board's decision. Piver, along with several other faculty members, supported Jourdan. The chairman of the school board, J. J. Smith, was in favor of refusing to renew Jourdan's contract. Smith and Piver were related by marriage.

Piver spoke on behalf of Jourdan and the other teachers who favored Jourdan at a public meeting in April, 1982,

before the school board vote. The meeting was called for the purpose of soliciting comments on Jourdan's tenure decision. After the school board decided not to renew Jourdan's contract, Piver joined with other faculty and community members to urge the school board to reverse its decision. He also allowed discussion of the issue and the circulation of a petition in support of Jourdan in his classroom. The school board, however, persisted in refusing to renew Jourdan's contract.

In June, 1982, a non-partisan election was held in Topsail Beach for the school board. Three incumbents ran for office, including chairman Smith. The record reveals that Piver himself, while personally opposed to the two incumbents who voted against Jourdan, did not participate in any campaigns against the incumbents. Piver's wife, however, actively campaigned on behalf of the challengers. The two incumbents who voted against Jourdan's reappointment, including chairman Smith, were defeated.

In July, 1982, Piver was reassigned by the school board, still headed by the lame duck chairman Smith, to a junior high school located approximately forty miles from his home. The school board members explained to Piver that they were concerned that he had been engaging in activities that were divisive and disruptive for the students during the controversy over Jourdan's contract. Piver filed a grievance and asked that the transfer be rescinded. In August, 1982, Piver reached an agreement with the school board whereby he remained at Topsail High School in exchange for signing a statement of support for the new principal at Topsail.[1] The statement that was ultimately

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[1] The statement, dated August 10, 1982, read as follows:

Gentlemen:

You have my assurance that I will cooperate fully with Mr. Thomas C. Benton, the new principal at Topsail High School, that I will perform my teaching duties and assigned responsibilities to the best of my

signed was the product of negotiations between Piver's attorney and counsel for the school board. Piver's attorney[2] testified that Piver understood the statement to be an alternative to remaining at the distant junior high school and filing suit against the school board. The attorney, in a deposition, appeared to assert that Piver was given his old job in consideration for signing the statement.

Approximately one year later, Piver retained different counsel for the purpose of having the statement of support removed from his personnel file. The school board agreed to remove the statement. In 1986, Piver retained his current counsel and filed suit against the school board, several individual members of the school board, and the superintendent of schools. The suit sought damages under 42 U.S.C. § 1983 (1982) for violation of Piver's rights under the first and fourteenth amendments to the United States Constitution, for violation of the equal protection clause of the fourteenth amendment to the United States Constitution, and for conspiracy to violate his constitutional rights under 42 U.S.C. § 1985(3) (1982). The claims against the Pender County Schools, the equal protection claim, and the conspiracy claim were dismissed by the district court pursuant to Fed. R. Civ. P. 12(b)(6). The district court later granted summary judgment for the defendants on Piver's claims under § 1983 and the first and fourteenth amendments. It is from that summary judgment that Piver appeals.

II.

When a public employee claims to have suffered discrimination because of the employee's exercise of rights

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ability, and that I will support the Board of Education in the implementation of its policies and decisions.

Sincerely yours,
/s/ Edwin G. Piver

[2] Gary E. Trawick was the attorney who represented Piver in the negotiations and who testified concerning the statement. Piver is currently represented by different counsel.

guaranteed by the first amendment to the United States Constitution, a court reviewing that claim must pursue a two-step analysis. First, the court inquires whether, as a matter of law, the speech was constitutionally protected. Speech is constitutionally protected only if it relates to matters of public concern, *see Connick v. Myers*, 461 U.S. 138, 146 (1983), and if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace. *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

A.

Speech that cannot "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, 461 U.S. at 146, or that concerns "matters bounded by [one's] immediate self-interest," *Lewis v. Blackburn*, 734 F.2d 1000, 1012 (4th Cir. 1984) (Ervin, J., dissenting) (dissenting opinion adopted by court en banc, 759 F.2d 1171 (4th Cir. 1985)), is not of public concern and therefore not protected by the first amendment. The district court, reading *Lewis* for the proposition that "disputes relating to personnel matters, such as the decision to grant tenure to a principal, have been held to be matters of private rather than public concern," held that Piver's speech was unprotected.

In *Pickering*, the Court held impermissible under the first amendment the dismissal of a high school teacher for openly criticizing the Board of Education for its allocation of school funds between athletics and academics and its methods of informing taxpayers about the need for additional revenue. The Court said that "free and open debate" about whether a school system requires additional funds "is vital to informed decision-making by the electorate." *Pickering*, 391 U.S. at 571-72. A teacher in a state college system who testified before committees of the legislature and became involved in a debate over changing his college to four-year status was engaged in speech that raised pub-

lic concerns. *See Perry v. Sinderman*, 408 U.S. 593, 598 (1972). A teacher who relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the principal had circulated to various teachers was also engaged in speech involving a matter of public concern. *See Mt. Healthy City Board of Education*, 429 U.S. at 284; *see also Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986) (school principal's speech to school board involving proposed transfer of his wife, an English teacher, involved issues of public concern), *cert. denied*, 55 U.S.L.W. 3807 (U.S. June 2, 1987); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986) (teacher's filing of grievances against principal involved topics of public concern), *cert. denied*, 55 U.S.L.W. 3569 (U.S. Feb. 24, 1987).

The *Connick* Court established that the test for the existence of speech on matters of public concern involves inquiry into the "content, form and context" of a given statement. 461 U.S. at 147-48. *Connick* did not hold that speech relating to employment grievances is always a personal matter; such a view would conflict with the Court's commitment to case-by-case balancing. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979) (criticism in private of the public employer's allegedly racially discriminatory policies can be of "public concern"); *see also McKinley v. City of Eloy*, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (policeman who was fired because of speech dealing with pay for city's police force raised a "public concern"); *Collins v. Robinson*, 568 F. Supp. 1464, 1468 (E.D. Ark. 1983) (policeman fired for writing a memo to his sheriff that criticized the behavior of the policeman's immediate superior held to have raised a public concern), *aff'd*, 734 F.2d 1321 (8th Cir. 1984); *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1769 (1984).

This court has elaborated on *Connick*'s "public concern" test:

> *Pickering*, its antecedents, and its progeny—particularly *Connick*—make it plain that the "public concern" or "community interest" inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that *all* public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee—most typically, a private personnel grievance. . . . The focus is therefore upon whether the "public" or the "community" is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985) (citations omitted). In excluding "private personnel grievances," the court in *Berger* screened out cases in which the aggrieved employee himself has spoken out about his own employment situation when that employment situation holds little or no interest for the public at large.

In *Jurgensen v. Fairfax County*, 745 F.2d 868, 878-79 (4th Cir. 1984), we held that a policeman who was demoted for surreptitiously giving an internal police department audit report to a journalist did not have his right of free speech violated. We held that the audit was not a matter of public concern. *Id.* at 888, 891 (Ervin, J., concurring). The contrast between the "content, form and context" of the speech in *Jurgensen* and the speech in the instant case illuminates the boundary of public employee speech that is constitutionally protected.

The content of the speech in *Jurgensen* concerned internal grievances about working conditions: the length of time on the job, the number of breaks that employees received, and so forth. The substance of Piver's speech, in contrast, centered on the adequacy of Jourdan's performance as principal of the high school, an issue in which Topsail Beach parents were vitally interested.

The form of the speech in *Jurgensen* involved the handing over of a report, taken from someone else's files, owned by the employer, and not prepared by the speaker, to a journalist at a private dinner meeting. The forms of Piver's speech included an oral presentation of his own thoughts at a public school board meeting, the guiding of class discussion and participation in his social studies class, and private conversations with the chairman of the school board and with other teachers.

The context of the speech in *Jurgensen* included a department regulation forbidding the release of information by employees of the police department without specific prior authorization. The context of Piver's speech was fundamentally different. The speech took place primarily in a public meeting called for the purpose of discussing Jourdan's tenure. The speech delivered information uniquely available to Piver; as a teacher under Jourdan, Piver had important insights into Jourdan's performance on the job. The speech was directed to a small community in which the speaker and the subjects of his speech were personally known by almost everyone.

Piver's speech clearly addressed matters of public concern. He spoke out on a matter in which the community of Topsail Beach was vitally interested. The subject of his speech was of much wider importance than a mere "private personnel grievance" like those raised in *Connick*, *Lewis* and *Jurgensen*.

Piver's support for Jourdan appears not to have been motivated by self-interest, as was the district attorney's

survey in *Connick* or the magistrate's protestations in *Lewis v. Blackburn*. His support was simply the informed viewpoint of a concerned faculty member. This sort of speech must not be chilled. Teachers should have an important voice in decisions abut the employment of school officials, because teachers are in one of the best positions from which to judge the officials' competence. The district court erred in holding that Piver's speech did not address an issue of public concern.

B.

Pickering teaches that a public employee's speech is not constitutionally protected, even if it addresses an issue of public concern, unless the employee's and the audience's interests in the speech at issue outweigh the harm caused by the speech to the defendants' interests in running the governmental office efficiently. In this case, Piver spoke once to an open meeting of the school board and the Topsail School Advisory Council; he attended a Board meeting after the decision not to award Jourdan tenure, but he did not speak at that meeting; he met privately with the chairman of the school board on three occasions to discuss Jourdan; he allowed students to discuss the issue during class time; and he allowed a petition in support of Jourdan to be circulated in his class, a class in social studies that apparently included training in civics.

Pickering gives several specific examples of legitimate employer concerns that might be threatened by particular forms of speech: discipline and harmony in the workplace, confidentiality, protection from false accusations that may prove difficult to counter given the employee's supposed access to inside information, freedom to discharge an employee whose speech has impeded the proper performance of his duties or is so lacking in foundation as to call his competence into question, and protection of close working relationships that require loyalty and confidence. 391 U.S. at 568-73. In *Connick*, the Court mentioned the need for

harmony in the office or work place; whether the government's responsibilities require close working relationships to exist between the plaintiff and co-workers; the time, place and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; whether the speech impeded the employee's ability to perform his or her duties; and whether the employer has exercised the discretion necessary for the proper management of internal affairs and personnel decisions. 461 U.S. at 150-51.

The extant case law devotes less attention to delineating the employee's interests in discussing matters of public concern and the public's interest in hearing such discussion. *See Developments in the Law—Public Employment*, 97 Harv. L. Rev. at 1760. At base, of course, is the fundamental concern that the first amendment manifests "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As has been pointed out by one distinguished commentator, the value of freedom of speech, the Constitution's "most majestic guarantee," is so high that it cannot be adequately described in purely instrumental terms. L. Tribe, *American Constitutional Law* § 12-1, at 576 (1978).

Certain features of Piver's speech clearly enhance its importance to him and to the public. First, part of the speech took place at a public meeting called for the very purpose of soliciting opinions on Jourdan's tenure decision. Both the employee and the public are centrally interested in frank and open discussion of agenda items at public meetings. Second, Piver had particular expertise on the issue of Jourdan's performance. The public has a need to hear from those who know concerning the performance of public officials. Third, weighing against the charge that

Piver's actions disrupted the classroom is his interest as a teacher in engaging his social studies students in issues of interest to the community. Although a teacher must obviously be wary of attempting to communicate his personal prejudices on issues that have more than one side, there is no indication in the record that Piver tried to propagandize his views. Instead, the record indicates that Piver merely allowed the students to discuss the issue and to use class time to organize their own petition drive in support of Jourdan. These factors add up to an exercise of first amendment rights in which both Piver and the community were vitally interested.

In contrast to the weighty interests supporting Piver's speech, the school board asserted only a threat of "turmoil" at the school. Although discipline and harmony in the work place are factors mentioned in *Pickering* and *Connick*, the threat to those values presented by Piver was clearly less worrisome than the interests trampled by the reprisal against Piver.

The district court never considered or passed upon the second prong of the *Pickering-Connick* inquiry—the "balancing" inquiry. We have addressed it, however, because it is a question of law and we are persuaded that the record below is sufficient to enable us to do so correctly. We therefore hold that the balance tipped in Piver's favor, and that this does not furnish an alternative basis for affirming the judgments.

III.

We next consider the question whether Piver has demonstrated any compensable damages for the alleged violation of his first amendment rights. Piver never actually was forced to transfer to a new job; he was reassigned to his original position after he signed the statement of support for the new principal.

The basic purpose of damages under 42 U.S.C. § 1983 is compensatory. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 254-55 (1978). The measure of damages under § 1983 must be based on the interests designed to be protected by the right that was violated; it is not a simple matter of applying damage formulas from tort law, or quantifying out-of-pocket expense. *Id.* at 258; *Memphis Community School District v. Stachura*, 54 U.S.L.W. 4771, 4775 (U.S. June 24, 1986) (Marshall, J., concurring). For example, substantial damages have been allowed in cases in which a person's right to vote was infringed, despite the plaintiff's inability to prove out-of-pocket expense. *See Carey*, 435 U.S. at 264-65, n.22. However, an award of substantial compensatory damages, as opposed to nominal damages, must be proportional to the actual injury incurred. Nominal damages may be awarded for any § 1983 violation. *See, e.g., Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391, 1408-13 (10th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 57-63 (D.C. Cir. 1984) (award of $3125 in compensatory damages for indirect first amendment violations held excessive), *cert. denied*, 470 U.S. 1084 (1985); *Kincaid v. Rusk*, 670 F.2d 737, 745-46 (7th Cir. 1982) (allowing nominal damages of $1 for denial of access to reading material in prison); *Dellums v. Powell*, 566 F.2d 167, 196 (D.C. Cir. 1977) (award of $7500 for actual loss of an opportunity to demonstrate held excessive); *Tatum v. Morton*, 562 F.2d 1279, 1282-84 (D.C. Cir. 1977) (award of $100 insufficient to compensate interruption of Quaker vigil in front of the White House). Substantial damages may be presumed in cases in which the actual proof of damages would be difficult or impossible. *See, e.g., Mickens v. Winston*, 462 F. Supp. 910, 913 (E.D. Va. 1978) (awarding presumed damages of $250 for racial segregation in prison), *aff'd mem.*, 609 F.2d 508 (4th Cir. 1979).

Punitive damages are allowed in a proper § 1983 case to punish defendants who act with a malicious intent to deprive plaintiffs of their rights or to do them injury, *see*

Carey, 435 U.S. at 257 n.11, or with reckless or callous indifference to the federally protected rights. *See Smith v. Wade*, 461 U.S. 30 (1983). A punitive award may accompany either a nominal award or a substantial compensatory award.

In the context of first amendment violations, the concurring opinion in *Stachura* quoted with approval the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Hobson*: injury to a protected first amendment interest can itself constitute compensible injury wholly apart from any "emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish" suffered by plaintiffs. *Hobson*, 737 F.2d at 62 (footnotes omitted), *quoted in Stachura*, 54 U.S.L.W. at 4775 (Marshall, J., concurring). But such injury can be compensated with substantial damages only to the extent that it is "reasonably quantifiable"; damages should not be based on the "so-called inherent value of the rights violated." *Stachura*, 54 U.S.L.W. at 4775 (Marshall, J., concurring). The award must focus on the real injury sustained and not on either the abstract value of the constitutional right at issue, *see Carey*, or the importance of the right in our system of government, *see Stachura*.

On remand, if the district court determines that Piver did not compromise and settle his claim against the defendants, then the court must analyze the damages that Piver incurred in terms of the injury to the interests protected by the first amendment.

IV.

The final question on appeal is whether Piver's signing of the statement of support in exchange for a return to his old job constituted a compromise and settlement of his claim against the defendants. A disputed or doubtful claim can be discharged and satisfied by some substituted per-

formance; when an agreement is made to discharge a disputed claim and the agreement is performed, the claim is said to have been compromised and settled.[3] A compromise and settlement may act as a bar to further action on the antecedent claim that forms the basis of the compromise. *See* 15A Am. Jur. 2d *Compromise and Settlement* § 24 (2d ed. 1976). If the claim that was compromised could have sought a different remedy, such as an action for damages rather than the injunction that Piver originally threatened to seek, then the compromise can act as a binding election of remedies. *Id.*

A compromise and settlement requires an offer and acceptance, consideration, and parties who have the capacity and authority to contract. *See, e.g.*, 15A Am. Jur. 2d, *Compromise & Settlement* § 7, at 779 (1976). We need not reach the question of whether federal or state law governs the formation of any settlement agreement, because the controlling factor must in either event be the intentions of the parties.

Although the relinquishment of a claim may be valid consideration, *see, e.g.*, 1 A. Corbin, *Corbin on Contracts* § 140, at 595 (1963), the court must inquire into whether the claim was in fact relinquished in exchange for adequate consideration and in the knowledge, actual or imputed, that a compromise was being executed. It is not necessary that the "minds of the parties" subjectively "meet," only that they make "mutual expressions of assent to the exchange." *Id.* at 107. Action taken by a party that is inconsistent with the rejection of an offer of compromise may be interpreted as acceptance of the compromise. For

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[3] Compromise and settlement is, therefore, a subset of the larger class of "accord and satisfaction." Any claim, including a certain, liquidated and undisputed claim, can be discharged by accord and satisfaction, but only disputed claims are discharged by means of compromise and settlement. *See* 6 A. Corbin, *Corbin on Contracts* § 1278, at 124 (1962).

example, one who cashes a check with the knowledge that the check was offered as a final settlement of a claim will be held to have compromised and settled the claim, despite having scratched out the words "in final settlement" on the face of the check. *See, e.g.*, 6 A. Corbin, *Corbin on Contracts* § 1279, at 130-31 (1962).

In our view, this record is inadequately developed to decide on appeal whether Piver's signing of the statement of support barred his later action under § 1983. There is evidence that the school board's offer of reassignment to Topsail High School was made in consideration of Piver's signing the statement, and there is evidence that Piver and his attorney understood the signing of the statement to be an alternative to litigation, but there has been no factual finding that Piver and the school board actually intended these events to compromise and settle Piver's claims against the school board. On remand, the district court should make such a determination and consider whether the compromise, if it existed, was made without duress, fraud, and mistake and was supported by fair consideration.

V.

The case is accordingly remanded to the district court for such a determination.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

WILMINGTON DIVISION

No. 85-71-CIV-7

EDWIN G. PIVER, *Plaintiff*	)	
v.	)	
PENDER COUNTY BOARD OF EDUCATION; and BILLY O. RIVENBANK, WILBERT HENRY, CHARLES F. SIDBURY, J. J. SMITH, and R. E. BROWN, Individually and as Members of the Pender County Board of Education and M. D. JAMES, Individually and as Superintendent of Schools of Pender County,	)	ORDER
Defendants	)	

This matter comes before the court upon the defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff, Edwin G. Piver, initiated this action against the Pender County Board of Education (Board), the individual Board members and the former Superintendent of the Pender County Schools by complaint filed June 25, 1985. The complaint sets forth three claims: the first claim, alleging constitutional violations of Piver's First Amendment rights, is brought pursuant to 42 U.S.C. §1983; the second and third claims, alleging violations of the Equal Protection Clause and conspiracy to deny the plaintiff equal protection of the laws,

were dismissed pursuant to an order of this court dated January 10, 1986. The present motion for summary judgment, therefore, concerns only the remaining First Amendment claims.

I. BACKGROUND

The material facts in this case are undisputed. Piver is a career teacher employed by the defendant Pender County Board of Education. Currently, and at all times relevant to this suit, Piver is assigned to the Topsail Junior/Senior High School (Topsail). In April of 1982, by a vote of 4 to 1, the Board elected not to renew the contract of R. J. Jourdan, the "probationary" principal at Topsail. The effect of renewing Jourdan's contract would have been to grant him tenure as a principal, as he had completed a three-year probationary period. *See* N.C. Gen. Stat. § 115C-325(c)(1). Prior to the Board's decision, the issue of Jourdan's contract was one of extensive discussion at Topsail. Piver, along with several other faculty members, was in favor of renewing Jourdan's contract. Other faculty members, however, were adamantly opposed to Jourdan.

A "public meeting" was scheduled in early April of 1982 to address the issue of the renewal of Jourdan's contract. Piver, with the support of other faculty members, drafted a statement in support of Jourdan and delivered the statement at the meeting. After the Board announced its decision not to renew Jourdan's contract, Piver became involved with a group of citizens that had joined together for the purpose of asking the Board to reverse its decision. Piver's involvement with this group was limited to speaking before it once or twice and attending the Board meeting at which this group made its request to reverse the decision on Jourdan's contract. The Board upheld its previous decision.

In June of 1982, a non-partisan Pender County Board of Education election was conducted. Three members of

the incumbent Board were running for re-election. The record reveals that while Piver personally favored the opposition to the incumbents, he took no active role in their campaign. There is some evidence, however, that Piver's wife, Kay Piver, openly supported the opposition. Two incumbents were ultimately defeated in this election, and left the Board in December of 1982.

On July 26, 1982, Piver was reassigned to Atkinson Junior High School. The Board informed Piver that they were concerned that he had been engaging in activities which were divisive and disruptive for the students. Piver then filed a grievance and asked that the transfer be rescinded. On August 10, 1982, the Board and Piver reached an agreement whereby Piver signed a statement in which he agreed to support the new principal at Topsail.[1] In turn, the Board rescinded the transfer. The statement signed by Piver was the result of negotiations between Piver's then counsel, Gary Traweck, and the Board's counsel, R. J. Biberstein.

Approximately one year later, Piver retained another attorney to have the statement removed from his personnel file. The Board ultimately agreed to remove this statement and it was deleted from Piver's personnel file. Piver has continued to teach at Topsail to this day. In 1985, Piver retained his current counsel and filed this action.

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[1] The statement dated August 10, 1982, reads as follows:

Gentlemen:

You have my assurances that I will cooperate fully with Mr. Thomas C. Benton, the new principal at Topsail High School, that I will perform my teaching duties and assigned responsibilities to the best of my ability, and that I will support the Board of Education in the implementation of its policies and decisions.

Sincerely yours,

/s/ Edwin G. Piver

II. DISCUSSION

Piver asserts that he was transferred in violation of his First Amendment rights for two reasons: first, because he supported Jourdan in his effort to remain principal at Topsail; and second, because he supported the opponents of the incumbent Board members in the June 1982 election. There is no issue of fact as to the content or context of Piver's activities. Therefore, summary judgment is appropriate.

A. Piver's Support for J. R. Jourdan.

The threshold inquiry is whether Piver's speech with respect to the issue of renewing Jourdan's contract involved matters of "public concern" or matters relating to Piver's "personal interest." Speech involving the former is protected, whereas speech involving the latter is not. *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983). If the employee's speech cannot be characterized fairly as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reasons for the employee's alleged reprimand. *Id.* at 1689. Whether Piver's speech involved a matter of public concern is to be determined by the content, form, and context of a given statement as revealed by the whole record. *Id.* at 1690. Additionally, the question relating to the protected status of speech is one of law; thus it is an appropriate issue to be resolved on a motion for summary judgment. *Id.*; *Heislup v. Town of Colonial Beach, Virginia*, No. 84-2143, slip op. at 19 (4th Cir. November 6, 1986) (per curiam).

In *Connick v. Myers*, the Supreme Court interpreted *Pickering v. Board of Education*, 88 S. Ct. 1731 (1968), and its progeny and attempted to strike a balance between the interest of an employee, as a citizen in commenting on the matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of public services it performs through its employees. The specific question framed by the Court in *Connick* was "whether

the First and Fourteenth Amendments prevented discharge of a state employee for circulating a questionnaire concerning internal office affairs." 103 S. Ct. at 1686. The state argued that since the employee's questionnaire concerned matters relating only to internal office affairs, this speech was not protected because, by definition, it did not relate to a matter of public concern.

The Court noted that "the First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." *Id.* at 1691. Finally, the Court recognized that even in those situations where the employee's speech has a limited impact on matters of public concern, it will not necessarily fall within the protection of the First and Fourteenth Amendments. *Id.* at 1693-94. In sum, the Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by the public agency allegedly in reaction to the employee's behavior.

Id. at 1690.

In this case the record reflects that there was a split in the faculty, students and concerned parents over whether Jourdan's contract should be renewed. The record further reveals that the Board had received complaints about Piver's attempts to enlist student support for Jourdan during class time. Disputes relating to personnel matters, such as the decision to grant tenure to a principal, have been held to be matters of private rather than public concern. *Lewis v. Blackburn*, 734 F.2d 1000, 1011 (4th Cir. 1984) (dissenting opinion of Ervin, J., adopted *en banc* in 759 F.2d 1171 (4th Cir. 1985)).

In applying the *Connick* test to Piver's assertedly protected First Amendment activities, this court finds that

Piver's speech did not relate to matters of public concern and, therefore, was unprotected. The subject of Piver's speech concerned personnel matters at Topsail School. Piver's challenges to the decision which the Board properly made within its discretion is a matter of private concern. The dispute at issue here was one involving professional judgment. The decision not to renew Jourdan's contract and grant him tenure was the Board's to make. The decision was not made arbitrarily or capriciously, but after seeking the input of concerned faculty and parents.

Here, the public interest was protected by the reasoned, informed judgment of the Board. Since the public interest was protected, the question of whether the Board made the right choice in denying to renew Jourdan's contract became an issue of private concern to Piver. *See Gurgensen* [*sic*] *v. Fairfax County, Virginia*, 745 F.2d 868 (4th Cir. 1984). Therefore, Piver's speech concerning the renewal of Jourdan's contract is not entitled to First Amendment protection.

B. Piver's Support of the Board's Opposition in the June 1982 Election.

Piver also asserts that he was transferred for his support of the candidates opposing the incumbents in the June 1982 School Board election. There is, however, no support for this allegation. In his deposition, Piver admits that he did not contribute to the campaign of the opposition candidates; that he made no speeches at any gatherings on their behalf; that he held no position in the campaign; that he had no yard-sign or bumper-sticker supporting the candidates; and that he was not in any way active in their campaigns. The evidence is clear that Piver took no role whatsoever in the campaign of any of the challengers to the Board's incumbents. There is, however, some evidence to suggest that Piver's wife was involved in a campaign dispute with one of the incumbents who was ultimately defeated. There is no further evidence that any member

of the five-man Board knew that Piver personally opposed the incumbents in the election or that such knowledge played any role in the Board's decision to transfer Piver to Atkinson Junior High School.

In *Mount Healthy City School District Board of Education v. Doyle*, 97 S. Ct. 568 (1977), the United States Supreme Court held that the burden was on the dismissed teacher to show (1) that his conduct was constitutionally protected and (2) that "this conduct was a 'substantial factor'—or to put it in other words, that it was the 'motivating factor' in the Board's decision not to rehire him." *Id.* at 576. Here, assuming *arguendo* that Piver's conduct was constitutionally protected, there is no evidence that Piver was actively involved in the campaign. Indeed, he has admitted he was not involved. Further, there is no evidence that the campaign or election played any role whatsoever in the Board's decision to transfer Piver. Accordingly, this court finds that there is no evidence upon which to rationally conclude that Piver's campaign involvement was a motivating factor in the Board's decision to transfer him to Atkinson Junior High School. *See, e.g., Solis v. Rio Grande City Independent School*, 734 F.2d 243, 247-48 (5th Cir. 1984). Accordingly, the defendants are entitled to summary judgment on this issue.

III. CONCLUSION

Upon the foregoing, the court hereby ORDERS that the defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is ALLOWED.

SO ORDERED this 3rd day of February, 1987.

/s/ TERRENCE W. BOYLE
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2536

EDWIN G. PIVER,
Plaintiff-Appellant,

v.

PENDER COUNTY BOARD OF EDUCATION, *et al.*,
Defendants-Appellees,

and

PENDER COUNTY SCHOOLS,
Defendant.

On Petition for Rehearing with
Suggestion for Rehearing In Banc.

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court

/s/ JOHN M. GREACEN
CLERK

Filed: January 26, 1988